U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-I-S-, INC.

DATE: MAY 16, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT staffing and consulting service, seeks to employ the Beneficiary as a software engineer I. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage and denied the petition.

The matter is now before us on appeal.[1] The Petitioner asserts that the Director denied the petition based on a miscalculation of its ability to pay the proffered wage to the instant Beneficiary and the beneficiaries of its other immigrant petitions. Upon *de novo* review, we will remand the matter to the Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

I. LAW AND ANALYSIS

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS)

[1] On December 11, 2015, an attorney filed a Form I-290B, Notice of Appeal or Motion, to appeal the Director's adverse decision. For appeals and motions filed on or after March 4, 2010, the regulation at 8 C.F.R. § 292.4(a) requires that a new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, "must be filed with an appeal filed with the [AAO]." The regulation at 8 C.F.R. § 292.4(a) further requires that the Form G-28 "must be properly completed and signed by the petitioner, applicant or respondent to authorize representation in order for the appearance to be recognized by DHS." Counsel did not file a Form G-28 with the Form I-290B. On February 8, 2016, we sent a facsimile to the attorney requesting that she submit a properly executed Form G-28 within 15 days. To this date, the attorney has not responded. The record does not contain a properly executed Form G-28, with a revision date on or after April 22, 2009, signed by both counsel and the Petitioner for the appeal. Therefore, we cannot consider counsel to be the Petitioner's attorney of record.

must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that the immigration service has authority to make preference classification decisions).

The priority date of this petition, which is the date the DOL accepted the labor certification for processing, is October 31, 2014.[2] *See* 8 C.F.R. § 204.5(d).

A. Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of

[2] The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g).

each beneficiary. *See Patel v. Johnson,* 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall* at 144-145.

The evidence in the record of proceeding shows that the Petitioner is structured as an S corporation. On the petition, the Petitioner claimed to have been established in 2004, have over $13 million in gross income, and to currently employ 120 workers. On the ETA Form 9089, signed by the Beneficiary on June 2, 2015, the Beneficiary claimed to have worked for the Petitioner since May 27, 2014. The minimum proffered wage as stated on the ETA Form 9089 is $79,186 per year.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the Beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, indicates that the Petitioner paid the Beneficiary $36,210 in 2014. As the Petitioner paid the Beneficiary partial wages in 2014, it must establish that it had the ability to pay the difference between the proffered wage and the actual wages paid in 2014, which is $42,976.

In addition, USCIS records indicate that the Petitioner has filed Form I-140 immigrant petitions on behalf of at least 93 other immigrant beneficiaries which were pending or approved from the instant priority date onwards.

On appeal and in response to the Director's October 19, 2015, request for evidence (RFE) the Petitioner provided partial information regarding its other Form I-140 immigrant petitions. The Director stated that the Petitioner provided information for 19 Form I-140 beneficiaries. However, the Petitioner provided information for 79 of the 93 Form I-140 beneficiaries.

In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition.[3] Although the record of proceedings has incomplete information on all 93 beneficiaries, we note that the Petitioner must establish that it had the ability to pay total wages of at least $1,473,334.80 in 2014, plus the $42,976.00 owed to the instant Beneficiary in 2014.

On appeal and in response to the RFE, both the Director and the Petitioner considered the total wages the Petitioner paid to all of its beneficiaries to off-set the total wages the Petitioner owed to all of its beneficiaries. However, this calculation is inaccurate, as the Petitioner paid some of its beneficiaries above their proffered wages. A petitioner may not use the excess amount paid to one

[3] However, the wages offered to the other beneficiaries are not considered after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider a petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

beneficiary to off-set the deficit to another beneficiary. In general, wages already paid to others are not available to prove the ability to pay a wage proffered to a beneficiary at the priority date of the petition and continuing to the present. The Petitioner did not demonstrate that the excess wages it paid some of its beneficiaries would be available to pay the wages of others.

On appeal and in response to the Director's RFE, the Petitioner prorated the wages owed to beneficiaries from their 2014 priority dates without submitting evidence of the payment of the beneficiaries' wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs. However, we cannot consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. If a petitioner wishes to prorate the proffered wage up to a specific date it must submit evidence of the payment of the beneficiaries' wages specifically covering the portion of the year that occurred prior to that date (and only that period), such as monthly income statements or pay stubs. If a petitioner is unable to establish that the full prorated proffered wage was paid during the relevant period it must establish that it had the ability to pay the difference between the actual wages paid and the full proffered wage through net income or net current assets. A petitioner must then establish that it had the ability to pay the difference between the actual wages paid and the proffered wage for the full year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. The courts have specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. *See River Street Donuts,* 558 F.3d at 118 and *Chi-Feng Chang,* 719 F. Supp. at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered

wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4]

The Petitioner's 2014 tax returns indicate that it had $303,541 in net income and -$575,013 in net current assets.[5] Although the Director did not consider the Petitioner's Schedule K in calculating the Petitioner's 2014 net income, the Petitioner did not submit evidence that it had sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid for the instant Beneficiary and the beneficiaries of the other immigrant petitions.

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. However, the Director did not consider the Petitioner's ability to pay the proffered wage under the *Sonegawa* factors.

Therefore, we will withdraw the Director's decision and remand the matter for consideration of the Petitioner's ability to pay the proffered wage in the totality of the circumstances.

B. Actual Employer

Although not addressed by the Director, we independently note that it is unclear that the Petitioner will be the Beneficiary's employer actual employer. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the DOL regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 29, 2016) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the Petitioner had additional income credits, deductions, or other adjustments shown on its Schedule K for 2014, the Petitioner's net income is found on Schedule K of its 2014 tax return.

> United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the Petitioner stated on the Form I-140 that it is an IT staffing company, indicating that it may serve as a placement service for other employers. The record of proceedings contains insufficient evidence of a permanent position available to the Beneficiary as an employee with the Petitioner. It is unclear whether the Petitioner has a *bona fide* job offer to the Beneficiary for the proffered position. This issue should be addressed with any further filings.

II. CONCLUSION

The Director did not consider the totality of the circumstances in determining whether the Petitioner has the ability to pay the proffered wage, including the wages to all of its beneficiaries. Therefore, the Director's decision will be withdrawn. The petition is remanded for consideration of the issues stated above.

ORDER: The decision of the Director, Texas Service Center is withdrawn. The matter is remanded to the Director, Texas Service Center for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-I-S-, Inc.*, ID# 16944 (AAO May 16, 2016)